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No. 00-492

In The

Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

v.

MICHAEL HERMAN BOZEMAN,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Alabama

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The sole issue presented is whether Article IV(e) of the Interstate Agreement on Detainers (IAD) mandated the dismissal of the indictments against Respondent Bozeman because of his one-day transfer between federal and state authorities for purposes of arraignment and the appointment of counsel, even though he suffered no harm whatsoever from that one-day transfer.[1] Relying on the well-established principle of law that errors that do not harm the rights of an individual should not result in reversal of convictions, the State of Alabama asserts that the harmless error rule applies to the IAD and that the Alabama Supreme Court erred in refusing to apply the harmless error rule to Bozeman's case and in holding that Bozeman's indictments should be dismissed. The Solicitor General, arguing a similar, but distinct, established principle of law, advocates that any violation of Article IV(e) of the IAD under the facts of this case was *de minimis* and does not require the indictments be dismissed. Bozeman argues, however, that these well-established principles of law should not apply because of what he describes as the plain and unambiguous language of Article IV(e);

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[1] The question whether the interpretation of the IAD is one of federal law or state law, or some hybrid of state and federal law, is not before this Court because it has previously been determined: The issue is one of federal law. *See New York v. Hill*, 120 S. Ct. 659, 662 (2000); *Cuyler v. Adams*, 449 U.S. 433, 438, 442 (1981). Because this issue is not one before this Court, no response is necessary to part I of Respondent Bozeman's brief. Moreover, because the issue of waiver was not raised in the courts below, the State of Alabama does not rely on the theory of waiver to support its argument, and a response to part V of Bozeman's brief is also pretermitted.

because of the intent of the parties to the IAD as expressed in the language of the Agreement; and, because reading into Article IV(e) either harmless error and/or *de minimis* principles would result in the provision having no effect. As will be demonstrated below, Bozeman's arguments do not withstand scrutiny because the language is neither as clear or unambiguous as Bozeman asserts; the provision can be given effect without displacing the background harmless error and *de minimis* principles against which the IAD was enacted and which the IAD is deemed to incorporate; and, to require dismissal would not be in accordance with the purposes of the IAD.

A. The Language Of Article IV(e) Is Not Clear And Unambiguous, And Is Subject To Interpretation.

Bozeman's primary argument is that, because the language of Article IV(e) of the IAD is clear and unambiguous, dismissal of his indictment was required. Setting aside for the moment the fact that nothing in Article IV(e) evinces an intent to displace the principles of harmless and *de minimis* error, see pp. 6-11, *infra*, the language of Article IV(e), and its application to the facts presented in this case, is neither as clear nor as unambiguous as Bozeman asserts.

Article IV of the IAD speaks only to transferring a prisoner for purposes of "trial" on outstanding charges. It says nothing about transferring a prisoner for purposes related to, but separate from, the actual trial, such as arraignment. Furthermore, Article IV(b) specifically indicates that request for temporary custody may be for

purposes other than for trial. Article IV(b) provides that, in requesting custody of a prisoner, one of the requirements is that the authority requesting temporary custody, give "the reasons therefore," indicating that the request for temporary custody could be for some reason besides trial. Moreover, Article IV(e) itself simply states that "[i]f trial is not had" on any indictment "as contemplated hereby", before the prisoner is returned to his place of imprisonment, then the indictment shall be dismissed with prejudice. However, it is uncertain what is "contemplated" by that provision of the Act.

Article IV(e) does not specifically answer the question of whether, if a prisoner is not brought to the receiving state for trial, but for some other purpose such as arraignment, the indictment must be dismissed. It could reasonably be determined that what is "contemplated" by Article IV(e) is that, if temporary custody of a prisoner is obtained for *trial* on outstanding charges, trial must be had on those charges before the prisoner is returned to the original place of imprisonment or the indictment must be dismissed, but if temporary custody of a prisoner is obtained for some other purpose, such as arraignment, then the provision does not apply at all. The point is that Article IV(e) is not so clear and unambiguous on its face and, therefore, cannot simply be interpreted by its terms to resolve the issue presented. There is certainly room for statutory construction of Article IV(e) and, when the provision is read in the context of the entire IAD, it does not require dismissal in the circumstances presented by this case.

When Article IV(e) is read in conjunction with the purpose of the IAD – to facilitate the disposition of outstanding detainers without interfering with rehabilitation efforts of the prisoner, *see, e.g., United States v. Mauro*, 436 U.S. 340, 351 (1978); Article I of the Interstate Agreement on Detainers – it is just as plausible, and probably more so, that the drafters of the IAD did *not* intend that a one-day transfer for arraignment purposes requires the harsh sanction of dismissal of the indictment with prejudice, as that they did intend such a result. The IAD is a remedial statute, *see Cuyler v. Adams*, 449 U.S. 433, 449-50 (1981), and, as such, it should be read to effectuate its purposes, *see Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). A construction of Article IV(e), keeping in mind the purposes of the IAD; the admonishment in Article IX that the "agreement shall be liberally construed so as to effectuate its purposes"; and, the rule of statutory construction that a remedial statute, like the IAD, is to be read so as to effectuate its purposes, leads to a conclusion that Article IV(e) was not meant to apply to the brief one-day transfer that occurred in this case. The purpose of the statute, again, is to facilitate the disposition of outstanding detainers and to do so without interfering with rehabilitation efforts of the prisoner; it is not to give the prisoner a way to avoid facing legitimate charges brought against him by a party state.

In the paperwork supporting her request for a transfer in this case, the District Attorney specifically stated that she was requesting transfer of Bozeman to Covington County for arraignment (App. 98-100), and the trial judge ordered Bozeman transferred only for that purpose and the appointment of counsel. Similarly, in

those federal cases on which the State relies, the inmate was only transferred for a brief period of time for similar purposes, and those courts found the IAD had not been violated. *See, e.g., United States v. Daniels*, 3 F.3d 25, 27-28 (1st Cir. 1993) (two brief one-day transfers, once for initial appearance and appointment of counsel and once for arraignment, did not violate Article IV(e) of IAD); *United States v. Roy*, 771 F.2d 54, 56, 59-60 (2nd Cir. 1985) (one-day transfer for suppression hearing did not violate Article IV(e) of IAD); *United States v. Taylor*, 173 F.3d 538, 540, 541-42 (6th Cir.) (six brief, same-day transfers between federal and state custody for various purposes, including initial appearance and arraignment, did not violate IAD), *cert. denied*, 120 S. Ct. 448 (1999); *United States v. Johnson*, 953 F.2d 1167, 1170-71 (9th Cir.) (several one-day transfers for purposes of arraignment and pretrial hearings did not violate IAD), *cert. denied*, 506 U.S. 879 (1992). Those courts obviously construed Article IV(e) as requiring only that the indictment must be dismissed if an inmate is taken into temporary custody for the purpose of *trial* and trial is not had on the indictment before the prisoner is returned, but not requiring that an indictment be dismissed if temporary custody is for some other purpose, such as arraignment, as in this case, especially when there is no demonstrable harm to the prisoner. Those courts either construed Article IV(e) as simply not applying to brief transfers for purposes other than trial or they applied harmless error or *de minimis* principles, finding no harm from the brief transfers, and therefore, no dismissals were warranted.

Although the State of Alabama's argument continues to be that the mere "technical error" that the Alabama

Supreme Court found to exist was at most, harmless error, Bozeman's argument that the language of the statute is clear and unambiguous on its face compels the rebuttal that there was, at least arguably, no error at all in the one-day transfer for arraignment – that Article IV(e) was not, in fact, violated by this one-day transfer. Although application of the harmless error rule avoids that thicket, Bozeman's "plain language" argument fails.

B. This Court Has Indicated A Preference For Application Of The Harmless Error Rule And Bozeman Has Failed To Demonstrate Any Reason Why It Should Not Be Applied To Article IV(e) Of The IAD.

As outlined in the State's initial brief, this Court has indicated a preference for the application of the harmless error rule in most circumstances. Nothing in the IAD evinces an intent to displace application of that bedrock principle of criminal procedure, or the related principle of *de minimis non curat lex*, which "is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). To the contrary, the IAD is at best silent regarding those principles. When confronted with IAD's similar silence regarding the background principle of waiver in *New York v. Hill*, 528 U.S. 110, 114 (2000), this Court concluded that the IAD does not displace, and in fact incorporates, the principle of waiver. *Id.* Confronted by the IAD's similar silence regarding harmless and *de minimis* error, the Court should likewise conclude that the

IAD does not displace, and in fact incorporates, those principles here. Bozeman argues, however, that this preferred rule should not be applied in this case because: harmless error only applies to rights that impact on court proceedings, usually at trial (Respondent's brief at 31-32); the IAD does not provide for harmless error and its provisions specifically contradict such an application (Respondent's brief at 33-34); Article IV(e) cannot be given effect if the harmless error rule is applied to it (Respondent's brief at 22-24, 33-34); and, application of harmless error would be unworkable in this situation (Respondent's brief at 35-38).

1. Bozeman's first argument, that the harmless error rule is reserved for trial errors, is contradicted by both the definition of harmless error and by case law from this Court. First, the harmless error rule itself does not limit it to application in the trial context. It refers to error that does not affect "a substantial right of the defendant," not merely to errors that affect the outcome of the trial. *See, e.g., Kotteakos v. United States*, 328 U.S. 750, 760, 765 (1946). Furthermore, while the harmless error rule has most often been applied in the trial context, this Court has previously applied harmless error in the non-trial context. *See, e.g., United States v. Montalvo-Murillo*, 495 U.S. 711 (1990); *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); *United States v. Mechanik*, 475 U.S. 66 (1986). Specifically, and most significantly, this Court held that the harmless error rule applied to the Bail Reform Act of 1984, which in no way implicated actual trial rights, just as the IAD does not implicate trial rights. *See United States v. Montalvo-Murillo*, 495 U.S. 711 (1990).

In *Montalvo-Murillo*, the petitioner urged that dismissal of the indictment was mandated under the Bail Reform Act of 1984 because the defendant had been denied the mandatory hearing in the time required by that statute. The Bail Reform Act of 1984 provides that, the judicial officer "*shall* hold a hearing to determine whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required and the safety of any other person and the community" and the "hearing *shall* be held immediately upon a person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance." *Montalvo-Murillo*, 495 U.S. at 714 (emphasis added). Montalvo-Murillo was not granted the detention hearing required by the statute at the time it was required and his indictment was ordered to be dismissed. *Id.* at 715-16. Despite the mandatory nature of the language of the statute, this Court held that the violation of the statute was harmless error, *id.* at 722, reasoning as follows:

> Our conclusion is consistent with the design and function of the statute. . . . Automatic release contravenes the object of the statute, to provide fair bail procedures while protecting the safety of the public and assuring the appearance at trial of defendants found likely to flee. The end of exacting compliance with the letter of § 3142(f) cannot justify the means of exposing the public to an increased likelihood of violent crime by persons on bail, an evil the statute aims to prevent . . . .
>
> . . .

> In these situations, there is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants every time some deviation from the strictures of § 3142(f) occurs.

Id. at 719-20. Likewise, in this case, a conclusion that harmless error should apply under the facts of this case, despite the mandatory language in Article IV(e), is consistent with the purposes of the statute and with principles of common sense.

2. Bozeman's second argument is equally unpersuasive. Bozeman argues that harmless error was not meant to apply to Article IV(e) of the IAD because the sanction for non-compliance with the provision is included in the provision itself – dismissal of the indictment with prejudice – and neither in Article IV(e), nor anywhere else in the Act, is harmless error mentioned. The failure to mention harmless error in the IAD is not, however, determinative of whether this Court will find harmless error applicable. In *Brecht v. Abrahamson*, 507 U.S. 619, 631-33 (1993), this Court held that harmless error applied to federal habeas corpus proceedings despite Congress's failure to address the matter in the habeas corpus statute.

Moreover, this Court found that an equally-established principle of law – waiver – applied to a similar provision of the IAD that required dismissal of the indictment with prejudice, even though waiver was not mentioned in the provision, nor contained anywhere in the IAD, and even though the provision had the mandatory sanction of dismissal of the indictment with prejudice for non-compliance. *See New York v. Hill*, 120 S. Ct. 659 (2000).

There, as here, the IAD provision at issue provided both a specific procedural rule (there, a speedy trial right) and a facially unconditional sanction for its violation (there, as here, dismissal). *See* Art. V(c); *Hill*, 528 U.S. at 112 ("If a defendant is not brought to trial within the applicable statutory period, the IAD requires that the indictment be dismissed with prejudice."). Recognizing that there is a presumption that waiver does apply, this Court found it did apply to violations of the IAD. *Id.* Similarly, this Court has recognized that there is a presumption that harmless error applies, and nothing in the IAD's text or structure precludes its application here. *Hill* is indistinguishable from this case on the plain language of the statute argument.

3. Third, Bozeman argues that Article IV(e) cannot be given any meaning or effect if the harmless error rule is applied to it. Contrary to his argument, however, the statute can be reasonably read, in its plain language, to mean that, if temporary custody of an inmate is transferred from the sending state to the receiving state *for trial*, and trial is not had on the outstanding charges, then the indictment must be dismissed with prejudice. If an inmate is briefly transferred from the sending state to the receiving state for some other purpose than trial, such as arraignment, appointment of counsel, a youthful offender hearing, or for an interview, and the inmate does not suffer any harm as contemplated by the IAD, then the indictment on any outstanding charges does not have to be dismissed with prejudice. Interpreting the statute in this way gives the particular section meaning and construes the section in such a way as to comply with the

purposes behind the IAD, without bestowing a windfall on the inmate from administrative errors.

4. Finally, Bozeman argues that the bright-line established in Article IV(e) is necessary for Article IV of the IAD to be workable and that the balancing test urged by the State would be unworkable. But the State is not requesting that a balancing test be performed by a trial judge, merely that a determination be made that a violation of Article IV(e) of the IAD harmed the prisoner before an outstanding charge, like the serious felony charge at issue here, be dismissed. This type of harmless error analysis is performed in a myriad of contexts; its performance in this context would be no more difficult or burdensome.

C. Application Of The Harmless Error Rule In This Case Would Require A Reversal Of The Alabama Supreme Court's Determination That Dismissal Of The Indictment Was Mandated.

Bozeman also argues that harmless error would not mandate a reversal in his case, even if such principles applied to the IAD.

First, Bozeman argues that he was harmed because he was prevented from consulting with counsel. See Respondent's brief at pages 8, 30. This argument was not made before the trial court and it is not, therefore, properly considered at this time. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here."). Moreover, an assertion by Bozeman that he was prevented from consulting with counsel, without more, does not demonstrate that he was harmed.

Second, Bozeman argues that the trial court's findings concerning the harm or lack thereof were not supported by the evidence before it. Bozeman, however, has never objected previously to any of the findings of the trial judge and he cannot, at this late date, obtain review of those findings. Moreover, even if those findings were reviewable, this Court's review of those findings should be highly deferential. *Hernandez v. New York*, 500 U.S. 352, 364-66 (1991). Applying such a deferential standard dictates a result in compliance with the trial court's finding: Bozeman was not harmed by the one-day transfer in this case.

Third, and in any event, this Court need not itself resolve whether the particular procedural mistake that occurred in this case prejudiced Bozeman's substantial rights. The question before this Court is a purely legal one – whether Article IV(e) of the IAD wholly precludes application of harmless error and *de minimis non curat lex* principles. The Supreme Court of Alabama held that Article IV(e) of the IAD has that effect; it therefore declined to examine the issue of prejudice. Because that was error, the judgment of the Alabama Supreme Court should be reversed.

Fourth, Bozeman alleges that, even if harmless error did apply to Article IV(e) of the IAD, he would still prevail because what more harm could he suffer than to have his indictment not be dismissed, as opposed to having it dismissed and not having to face charges. The harm that must be addressed, however, is the harm caused by the error, the violation of Article IV(e), not the harm caused if the harmless error rule applies. The focus must be on whether Bozeman was harmed by the one-day

transfer, not whether he will be harmed by the failure to dismiss the indictment. To follow Bozeman's logic would eviscerate the rule altogether. For example, if, on appeal, an appellate court finds that error occurred in the trial, ordinarily, reversal would be required if the issue was preserved. An appellate court will not reverse the case, however, if it finds that the error did not harm the defendant, if it did not affect a substantial right. To follow Bozeman's reasoning, any time an appellate court found the error harmless and did not reverse the case, the defendant will have been harmed in such a way that harmless error should not apply. The difference is between having the case reversed and not having the case reversed, just like the difference is between having the indictment dismissed and not having the indictment dismissed. Bozeman's focus on the outcome is not a proper application of the harmless error rule and should not be adopted.

Finally, Bozeman argues that the State is attempting to shift to him the burden of proving that he was not harmed by the one-day transfer. Such an assertion is not true. The trial court found that there was no harm to Bozeman from the one-day transfer and Bozeman never objected to those findings. He cannot now claim that they were improper. The State merely relies on those factfindings to demonstrate that there was no harm to Bozeman from the one-day transfer.

Application of the harmless error rule is not precluded by any of the terms of Article IV(e) nor any other provision of the IAD, and its application would best serve the purposes of the IAD under the facts of this case. Bozeman was not harmed by his one-day transfer of

custody between federal and state officials, and the windfall of avoiding prosecution should not be granted to him. This Court should reverse the decision of the Alabama Supreme Court.

Respectfully submitted,

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